

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN B. HAYDEN,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

(CSA 3 162 784)

DOCKET NUMBER
SF0831920393-I-2

DATE: JUL 8 1993

John B. Hayden, Los Angeles, California, pro se.

Jane N. Lohr, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM). For the reasons set forth below, we GRANT the petition for review, AFFIRM the part of the initial decision that concerns credit for the appellant's military service and leave, VACATE the rest of the initial decision, and REMAND the appeal to the regional office for further adjudication.

BACKGROUND

In February 1984, the appellant applied for a Civil Service Retirement System annuity. See Remand Initial Appeal File (RIAF), Tab 4, OPM Letter of Sept. 11, 1991. OPM disallowed his application because he was not eligible to retire immediately. In August 1989, the appellant again applied for an annuity. OPM approved this application and computed his years of service at 25 years and 11 months of creditable service.¹ See RIAF, Tab 4, OPM Document "Computation of Your Annuity."

The appellant disputed the years of creditable service, claiming that he had not received credit for military service in 1955-57 or for unused sick leave. The appellant also disputed the amount of his annuity, which he claimed was based on incorrect figures for his "high three" years of basic pay. Additionally, the appellant claimed that OPM had not paid him the entire amount owed. See Initial Appeal File (IAF), Tab 3, Subtab 5. Upon reconsideration, OPM determined that the appellant's post-1956 military service was not creditable because he had not made the required deposit and that it had paid him the correct amount. See IAF, Tab 3, Subtab 2. The appellant then filed an appeal. See IAF, Tab 1. The administrative judge determined that the appellant was

¹ In March 1985, OPM had informed the appellant that he had a total of 27 years and 6 months of creditable service. See Initial Appeal File, Tab 3, Subtab 6. In an October 23, 1991, letter OPM stated that the previous calculation was an error because it mistakenly gave him credit for unused sick leave and military service. See RIAF, Tab 4.

entitled to credit for military service before January 1, 1957. He also instructed OPM to allow the appellant to deposit the amount required for entitlement to service credit for military service in 1957. As for the appellant's other two contentions, that the "high three" was wrongly determined and that the amount already paid was incorrect, the administrative judge found that OPM had not submitted sufficient information on which to make a determination and thus remanded the appeal to OPM for further development of its records and submission of readily understandable explanations. The administrative judge dismissed the appeal without prejudice. See IAF, Tab 9.

Subsequently, the appellant refiled his appeal raising the same contentions. See RIAF, Tab 1. The administrative judge then found that OPM had offered him an opportunity to deposit the amount required for eligibility for service credit for his 1957 military service. The administrative judge rejected his argument that he should not be required to make the deposit because he received no notice of the requirement at the time. The administrative judge also found that OPM adequately supported its determinations regarding the amounts due and paid to the appellant and its calculations of the amount of his annuity based on his "high three." See RIAF, Tab 7.

In his petition for review, the appellant contends that OPM's determination of his "high three" is based on false information; he did not receive the annuity due him from

July 9, 1989, to March 1, 1990 (\$7,840.67); he was unjustly denied credit for his military service; he is entitled to credit for sick leave and annual leave; his lump-sum payment should have included retirement deductions withheld from November 5, 1980, to May 28, 1983; a \$3,336 overpayment is not an issue; and OPM did not comply with the administrative judge's remand order. See Petition For Review (PFR) File, Tab 5. OPM has not responded to the petition for review.

ANALYSIS

The amount of an annuity is based on, inter alia, an employee's average pay, which is the average of the highest rate of basic pay for three consecutive years, the "high three." See 5 U.S.C. §§ 8339(a) and 8331(4). OPM submitted a table purporting to show the time periods and salary rates in effect for the appellant's "high three."² See RIAF, Tab 4. In its October 23, 1991, letter, OPM informed the appellant that it based its calculation of his average salary for his "high three" on rates of basic pay taken from his Individual Retirement Record (SF2806). See *id.* Upon comparing the

² The time period extends over more than a three-year period, from May 29, 1979, to May 28, 1983, to account for periods of time when the appellant was not in a pay status. See RIAF, Tab 4, OPM Letter of October 23, 1991. The appellant was placed on emergency suspension and then removed in November 1980. The removal action was sustained on appeal. See *Hayden v. U.S. Postal Service*, 15 M.S.P.R. 296 (1983), *aff'd*, 758 F.2d 668 (Fed. Cir. 1984) (Table). The record indicates that the appellant was not in a pay status after November 4, 1980. See RIAF, Tab 3. His employing agency carried him on its rolls until the Board issued its decision on petition for review of the removal action on May 23, 1983. Periods of time spent in a non-pay status up to 6 months per year are creditable. See 5 U.S.C. § 8332(f).

SF2806 base pay and the annual rates noted on OPM's "High-3" Average Salary Computation table, we find that the amounts do not match in every instance. See RIAF, Tab 4; IAF, Tab 3, Subtab 6. OPM's table lists the appellant's annual rate from May 29, 1979, to December 31, 1979, as \$23,121.22. The SF2806 contains no record of base pay before July 28, 1979, places his base pay on July 28, 1979, at \$23,379, and credits him with an increase on October 6, 1979, to \$24,080. OPM's table lists the appellant's annual salary from January 1, 1980, to December 31, 1980, as \$26,472.85. The SF2806 lists his base pay on January 26, 1980, as \$24,923 and on March 22, 1980, as \$26,007. According to OPM's table, the appellant's annual salary from January 1, 1981, to May 15, 1981, was \$26,007 and then increased to \$26,527 on May 16, 1981. The SF2806 and OPM's table agree from that point on.³

Regulations at 5 C.F.R. § 831.103 provide that the SF2806 is the basic record for action on all claims for an annuity or refund. OPM stated that it relied on the SF2806 prepared and certified as correct by the appellant's employing agency. See RIAF, Tab 4, OPM Letter of October 23, 1991. The SF2806 included in OPM's submissions does not contain a certification, is not signed, and in fact is incomplete because it contains no records of the appellant deductions.

³ The appellant received credit for only 6 months during 1981 and 1982 because he was not in a pay status during the pendency of his removal appeal. He received credit for the period between January 1, 1983, and May 28, 1983, when his employing agency removed him from the rolls following the denial of his petition for review.

See IAF, Tab 3, Subtab 6. The appellant submitted below a copy of an SF-50 showing that his base salary for the relevant time periods was different from the base salaries recorded on both the SF2806 and OPM's table. See RIAF, Tab 3. OPM informed the appellant that if he disputed the salaries on the SF2806, he should take that complaint to his employing agency because OPM relied on the information as certified by the employing agency. See RIAF, Tab 4, OPM Letter of October 23, 1991. In this case, the information does not appear to have been certified. On remand, the administrative judge shall provide OPM with an opportunity to present evidence that it relied on information properly certified, and he shall afford the appellant an opportunity to show that his base salary as reflected on the SF-50 is correct.

The appellant also argues that OPM did not pay him all of the monies owed to him since July 9, 1989. See PFR File, Tab 5. When the appellant initially applied for an annuity, OPM awarded him interim payments totaling \$3,336. OPM subsequently informed the appellant that the \$3,336 was an overpayment subject to repayment. The appellant repaid the entire amount of the overpayment in 1985. On March 20, 1990, in response to his second application for an annuity, OPM authorized an interim payment of \$19,496.59, representing an alternative annuity lump sum payment of \$15,898.92 and an estimated annuity of \$3,597.67 for the period of July 9, 1989, when the appellant became eligible to retire, to February 28, 1990. After deductions for Federal tax, this interim payment

amounted to \$16,519.97. Subsequently, OPM determined that the appellant was entitled to an annuity of \$7,840.67 for the period of July 9, 1989, to March 31, 1990. From that amount, OPM deducted \$3,597.67, the estimated interim payment, \$136.05 for Federal tax, and \$3,336 for the overpayment made in 1984, authorizing payment of \$770.95. See RIAF, Tab 4, OPM Document "Explanation of Interim and Lump Sum Payment." Upon discovering its error regarding the \$3,336 overpayment, it repaid the appellant that amount. See RIAF, Tab 4, OPM Letter of Sept. 11, 1991.

OPM submitted a summary of payments from its Allotment and Change of Address Branch, showing that in March 1990 OPM authorized payment of \$16,519.97, the net amount owed. The summary of payments also shows that in April 1990 OPM paid the appellant \$770.95 as an adjustment of the interim payment. OPM also submitted copies of employee annuitant master record printouts, which indicate that the appellant was paid \$770.95 and repaid \$3,336. The appellant acknowledged receiving \$770.95. See RIAF, Tab 5. OPM submitted a copy of a voucher showing that it paid him \$3,336 in August 1991.

The appellant asserted that he received a check for \$15,898.92 rather than the \$16,519.97 to which he was entitled. Although the administrative judge stated that the appellant had provided no evidence to support this claim, we note that the appellant submitted a deposit slip from his credit union showing that he deposited \$15,000 on March 27, 1990. In his accompanying notarized statement, he declared

that he "took \$898.92 cash." See IAF, Tab 8. We also note that OPM has not submitted a copy of the cancelled check or a voucher authorizing payment. In addition, contrary to the administrative judge's finding, we find that OPM's employee annuitant master record printout does not indicate payment of \$16,519.97. None of the printouts record such a payment. Furthermore, the record contains three different copies of the summary of payments, each signed by a different person. See RIAF, Tab 4; IAF, Tab 3, Subtabs 4, 5, and Tab 5. While the net amount of \$16,519.97 is the same in each, the figures to arrive at that amount differ. Also, the summaries do not indicate the exact date of payment but only the month. They appear to represent a calculation of the amount to which the appellant was entitled, not a record of the amount actually paid. Although the administrative judge theorized that OPM would not have authorized a check for \$15,898.92 because that figure represents the lump-sum payment before taxes, see Remand Initial Decision at 7, it is possible that OPM misread its calculations and authorized payment in the wrong amount. On remand, the administrative judge should reconsider his conclusion regarding this issue in light of the evidence described above, the other evidence of record, and any further evidence and argument the parties may submit.⁴

⁴ The appellant argues that he did not receive a check for \$7,840.67, the amount of his annuity from July 9, 1989, to March 31, 1990. See PFR File, Tab 5. The appellant was not entitled to a check in that amount. What he should have received is a check or checks totalling \$16,519.97, his lump-sum payment and interim payment less taxes; a check for

The appellant also argues that OPM did not credit all of his military service. See PFR File, Tab 5. OPM and the administrative judge determined that he was entitled to service credit for his military service before January 1, 1957. See Remand Initial Decision at 3-4. OPM submitted a document entitled "Summary of Federal Service" that lists the appellant's periods of service with the U.S. Postal Service. See RIAF, Tab 4. The summary does not list the dates of the appellant's military service. The document states at the bottom of the list, "Total Service 25 years 11 months." The periods of service listed, however, total 24 years and 6 months. The record shows that OPM computed the appellant's annuity based on 25 years and 11 months of service. See *id.* The appellant asserted on his appeal form that his military service extended from August 1955 to August 1957. See IAF, Tab 1. Presumably, the 1 year and 5 months unaccounted for on OPM's summary represents his pre-1957 military service. The appellant has not shown that he is entitled to credit for additional service before 1957. Therefore, we find that OPM credited him with the correct amount of service.

Both the administrative judge and OPM found that the appellant was entitled to credit for the approximately 5 months of military service in 1957 subject to making a deposit as required by 5 U.S.C. § 8332(c)(1) and 8332(j)(2)(A). See Remand Initial Decision at 4; RIAF, Tab 4, OPM Letter of \$770.95, the adjustment to his interim payment less taxes; and a check for \$3,336, in repayment for the \$3,336 erroneously deducted from his adjusted annuity.

August 18, 1992. OPM informed the appellant of that right as the administrative judge ordered. If the appellant makes the required deposit, OPM must recompute his annuity to account for the additional time. OPM need take no further steps in that regard, however, until the appellant makes the deposit. As the administrative judge found, the appellant's argument that OPM should award him service credit without deposit because of lack of notice regarding the necessity to deposit fails. See Remand Initial Decision at 4. OPM and the Board have no discretion to waive statutorily imposed requirements and the government cannot be estopped from denying benefits not otherwise permitted by law even if the claimant was denied monetary benefits because of his reliance on the mistaken advice of a government official. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990).

The appellant is not entitled to service credit for his unused sick leave and annual leave. Only employees eligible for immediate retirement may receive service credit for unused sick leave. See 5 C.F.R. § 831.302(a). The appellant was separated in 1983, but was not eligible to receive an annuity because he had not met the age and years of service requirements for immediate retirement. Therefore, he is not entitled to credit for his unused sick leave. Upon separation, an employee receives payment for any unused annual leave, and such leave is not counted toward service credit for retirement purposes. See Federal Personnel Manual Supp. 831-1, subchapter S3-4(1). The record indicates that the

appellant was paid for his unused annual leave. See IAF, Tab 1.

The appellant's contention that his alternative lump-sum payment should have been increased to account for contributions after the removal action against him in 1980 is also meritless. An employee entitled to a lump-sum payment receives a refund of the deductions taken from his pay. See 5 U.S.C. §§ 8343a(b)(1)(A) and 8331(8). He does not receive the contributions that the agency made on his behalf. The appellant was not in a pay status after November 4, 1980, even though he was carried on the rolls until the petition for review of the removal action was decided. Therefore, no deductions were taken during that time.

ORDER

We REMAND this appeal to the regional office for further development of the record and a determination of the appellant's "high three" and average rate of basic pay and monies paid for the period from July 9, 1989, to March 31, 1990. If the appellant makes the required deposit, his years of creditable service shall include his post-1956 military service.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.